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6 IN THE UNITED STATES DISTRICT COURT

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10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

No. CR 17-00093 WHA

Plaintiff,

**ORDER RE SECOND RENEWED
MOTION TO COMPEL OPD AND
SLPSO MATERIALS**

v.

MARCUS ETIENNE, *et. al.*,

Defendants.

INTRODUCTION

In this prosecution under the Racketeer Influenced and Corrupt Organizations Act, the Violent Crimes in Aid of Racketeering Act, and other penal statutes, defendants move to compel disclosure of materials from the Oakland Police Department and the St. Landry Parish Sheriff's Office under *Brady*.

STATEMENT

Previous orders have described the facts of this case. In short, defendant Marcus Etienne and Mario Robinson have been indicted for, among other things, a conspiracy to distribute and possess with intent to distribute marijuana as well as murder in connection with the conspiracy. The Etienne enterprise is based out of St. Martin Parish, Louisiana and allegedly operates throughout Louisiana, California, and Texas. Relevant to this order is the allegation defendant Burte Gucci Rhodes murdered victim T.T., a previous member of the Etienne enterprise, in

1 Oakland, at the behest of defendants Etienne and Robinson. The Oakland Police Department
2 (OPD) investigated T.T.’s murder.

3 In August 2018, defense counsel submitted an *ex parte* application for the issuance of a
4 subpoena *duces tecum* under Rule 17(c) directing the OPD to produce specified documents
5 relating to its investigation of the homicide of victim T.T. In September 2018, the City of
6 Oakland moved to quash the subpoena and the government joined the motion. Multiple hearings
7 were held on the matter including an evidentiary hearing in which OPD Sergeant Richard Vass
8 testified as to the existence of certain documents sought by the subpoena, specifically officer
9 notes of witness interviews, which had not been produced to the defense but which the
10 government claimed to have in its possession. Throughout the process, the government denied
11 any “joint investigation” with OPD and instead claimed to have “adopted” the investigation from
12 Oakland when it turned over its entire investigatory file. The government also, however, stated in
13 its motion for joinder in OPD’s motion to quash and motion to quash subpoena:

14 However, even if the government did not have valid witness safety
15 concerns, the government has no obligation to produce these reports
16 under Rule 16. The OPD reports are not subject to Rule 16 discovery
17 because they are “*reports, memoranda, or other internal government*
18 *documents made by an attorney for the government or other*
19 *government agent in connection with investigating or prosecuting the*
20 *case.*” Fed. R. Crim. P. 16(a)(2). The Ninth Circuit held in *United*
21 *States v. Fort*, 472 F.3d 1106 (2007), that Rule 16(a)(2)’s exemption
22 from discovery extends to police reports “created prior to federal
involvement but relinquished to federal prosecutors to support a unified
prosecution of Defendants for the same criminal activity that was the
subject of the local investigation.” *Id.* at 1120. Although the
government does have witness safety concerns given the nature of the
charges in this case, the Ninth Circuit’s “interpretation of Rule 16(a)(2)
applies regardless of the content of the non-disclosed inculpatory
information and regardless of the potential effect of disclosure on
witness safety.” *Id.* at 1110 n.1.

23 Nor has the government waived the protections of Rule 16(a)(2) by
24 producing redacted copies of the police reports to defendant Etienne.
Fort, 472 F.3d at 1120. By “systematically redacting all witness
locator information,” the government has demonstrated that “it did *not*
intentionally or voluntarily relinquish its rights under Rule 16(a)(2) to
hold back this information from discovery.” *Id.* at 1121 (emphasis in
original).

25 Dkt. No. 232 at 4 (emphasis added). A December 2018 order granted the motion to quash on the
26 ground the subpoena was too broad. The order, nonetheless, allowed defense counsel to copy and

1 inspect certain officer notes that had been lodged *in camera* pursuant to an attorney's-eyes-only
2 protective order.

3 In parallel with the above, in September 2018, defense counsel submitted an *ex parte*
4 application for the issuance of a subpoena *duces tecum* directing the St. Landry Parish Sheriff's
5 Office to produce specific documents related to the investigation of a previous assault on T.T. as
6 well as the homicide of another victim allegedly related to the Etienne enterprise. In October
7 2018, the SLPSO moved to quash the subpoena and the government joined the motion. A
8 hearing was held on the matter following which the SLPSO produced the responsive materials in
9 its possession for *in camera* review. A November 2018 order allowed defense counsel to review
10 the lodged materials in the Court's jury room.

11 Meanwhile also in November 2018, defendants Etienne and Robinson filed a joint motion
12 to compel disclosure in which the defense identified a number of items they had requested be
13 produced by the government, but which the government had failed to produce. One of these
14 items included *Brady* materials in possession of the OPD such as interviews with victim T.T.
15 prior to his death. A December 2018 order stated, “[t]o the extent defendants move to compel
16 answers to [requests for information], the motion is denied. As to the remaining evidentiary items
17 raised in defendants' motion, counsel for the parties shall meet and confer by December 21,
18 following which defendants may renew their motion with respect to any outstanding issues.” The
19 parties met and conferred on December 20, January 28, and January 30. In February 2019,
20 defense counsel met with and sent a letter to the government requesting items that had yet to be
21 produced including the OPD *Brady* materials. The government failed to respond. In June 2019,
22 defendants filed a renewed motion to compel.

23 In June 2019, the government filed a supplemental memorandum stating Sergeant Vass
24 was a member of the prosecution team given his assignment as an FBI Task Force Officer to the
25 matter and that the government is thus responsible for *Brady* materials in his possession. The
26 government, however, also contended it has no *Brady* obligation as to the rest of OPD because the
27 OPD does not operate at the government's direction. Defendants filed a supplemental response in
28 July 2019. Defendants then filed a second motion to compel in August 2019, requesting again,

1 among other things, the *Brady* materials in possession of the OPD and the SLPSO. The parties
2 were able to resolve all issues except the OPD and SLPSO *Brady* materials request.

3 **ANALYSIS**

4 *Brady v. Maryland*, requires prosecutors to disclose materially exculpatory evidence in the
5 government's possession to the defense. 373 U.S. 83 (1963). *Kyles v. Whitley* further held that
6 the prosecution has an affirmative duty to learn of, and disclose, any favorable evidence known to
7 "others acting on the government's behalf in the case, including the police." 514 U.S. 419, 437
8 (1995). In *Kyles*, petitioner Curtis Kyles petitioned for habeas relief claiming a *Brady* violation.
9 Specifically, he contended the government failed to provide him with the following evidence:
10 contemporaneous eyewitness statements taken by the New Orleans police following the murder in
11 question, statements made to police by an informant who was never called to testify, and a
12 computer printout of license numbers of cars parked at the crime scene on the night of the murder,
13 which did not list the number of Kyles's car. *Id.* at 428–29. The government argued that
14 because some of the favorable evidence at issue was not disclosed to the prosecutor until after
15 trial, it should not be liable under *Brady*. *Id.* at 438. The Supreme Court of the United States
16 ultimately held, however, that a prosecutor remains responsible for producing *Brady* evidence
17 regardless of any failure by the police to bring it to the prosecutor's attention. *Id.* at 420.

18 The extent to which a police department is considered to act on the government's behalf,
19 and accordingly, the government's obligation under *Brady* as to materials in possession of a
20 police department has never been clearly delineated. Our court of appeals has offered some
21 guidance as has the Office of the Deputy Attorney General. In *United States v. Price*, a
22 prosecutor had instructed his lead investigative agent to run a criminal history check on a key
23 witness. 566 F.3d 900, 911 (9th Cir. 2009). The prosecutor did not recall or know the results of
24 the check and failed to tell defendant about the witness's previous acts of fraud and dishonesty.
25 *Id.* at 903. Our court of appeals found that because the prosecutor directed the activities of the
26 detective, he had a duty to learn of and disclose *Brady* evidence in the detective's possession. *Id.*
27 Specifically, "if the prosecutor either failed to disclose the information or failed to discover that
28 his agent knew of or possessed" *Brady* material, a violation occurred. *Id.* at 910 (emphasis

1 added). Furthermore, the Office of the Deputy Attorney General has also provided a list of
2 factors to consider in determining the extent to which a police department or officers act on the
3 government's behalf. These factors include: whether the prosecutor and the agency conducted a
4 joint investigation or shared resources related to investigating the case, whether the prosecutor
5 knew of and had access to discoverable information held by the agency, and whether the
6 prosecutor had obtained other information and/or evidence from the agency. U.S. Dep't of
7 Justice, Memorandum for Department Prosecutors, (Jan. 4, 2010).

8 Related to the instant issue is Rule 16 which allows defendants to subpoena certain
9 documents and statements made within the government's possession, custody, or control. The
10 main exception is that the rule "does not authorize the discovery or inspection of reports,
11 memoranda, or other internal government documents made by an attorney for the government or
12 other government agent in connection with investigating or prosecuting the case." Rule 16(a)(2).
13 Our court of appeals has held the term "government agent" in Rule 16(a)(2) includes non-federal
14 personnel whose work contributes to a federal criminal case. *United States v. Fort*, 472 F.3d
15 1106, 1113 (9th Cir. 2007). It has also held Rule 16(a)(2)'s exemption extends to police reports
16 "created prior to federal involvement but relinquished to federal prosecutors to support a unified
17 prosecution of Defendants for the same criminal activity that was the subject of the local
18 investigation." *Id.* at 1120.

19 Here, defendants have provided various examples suggesting the OPD and SLPSO are
20 members of the prosecution team given the intertwined nature of the OPD and FBI investigation
21 into T.T. For example, an OPD sergeant and an FBI special agent interviewed T. T. in August
22 2016 together prior to his death. Furthermore, Sergeant Vass directed another OPD sergeant to
23 send Verizon a pen register and trap/trace request on a telephone number in an effort to prevent
24 the murder of one of the defendants. Defendants also cite to a hearing in which Detective
25 Cormier of the SLPSO stated he was contacted by the FBI division in Oakland regarding the
26 murder of a man allegedly related to the Etienne enterprise and that he delayed arrest of the
27 suspect in that murder until the OPD arrested the suspect in T.T.'s murder.

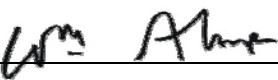
28 Nonetheless, this order need not analyze the extent of the OPD's or SLPSO's

1 involvement with the prosecution. The government has maintained that it had no obligation to
2 produce unredacted versions of the subpoenaed OPD reports under Rule 16 as they are “reports,
3 memoranda, or other internal governmental documents made by an attorney for the government
4 or other government *agent* in connection with investigation or prosecution the case” (emphasis
5 added). The government cannot have its cake and eat it too. It cannot state in one instance that
6 the OPD is a government agent and in the next breath state the OPD is not a government agent in
7 an effort to skirt its *Brady* obligation. This order accordingly holds that the government must
8 produce all *Brady* materials in the possession of the OPD. This must be done by the *Brady*
9 deadline in the scheduling orders.

10 As to the SLPSO, the government has not indicated (as it has with the OPD) that the
11 SLPSO is its agent. Accordingly, on this record, the government is not obligated to produce
12 *Brady* materials solely in the possession of the SLPSO.

13
14 **IT IS SO ORDERED.**

16 Dated: October 16, 2019.

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WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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